No. 94-1893

In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, ET AL.,
PETITIONERS

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE
COMPANY OF VIRGINIA, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT*

SUPPLEMENTAL BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF AUTHORITIES

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Pursuant to this Court's Rule 15.7, the Solicitor General, on behalf of the United States, the Federal Communications Commission (FCC), and the Attorney General of the United States, respectfully files this supplemental brief to inform the Court of the outcome of rulemaking that was initiated by the FCC before the petition for a writ of certiorari was filed in this case.

1. On May 17, 1995, petitioners filed a petition for a writ of certiorari in this case, seeking review of a

decision of the United States Court of Appeals for the Fourth Circuit that held unconstitutional 47 U.S.C. 533(b). Section 533(b) is a cross-ownership regulation of the cable television market that prohibits local telephone companies (LECs) from providing video programming directly to subscribers in their telephone service areas. As we explain in the petition (Pet. 7, 13-14, 15-17), Section 533(b) also contains a waiver provision, which permits the FCC to waive the cross-ownership bar on a "showing of good cause, * * * [and] upon a finding that the issuance of such waiver is justified by the particular circumstances demonstrated by the petitioner, taking into account the policy of [the bar]." 47 U.S.C. 533(b)(4). We also advised the Court, in the petition (Pet. 13-14, 15-17), that the FCC had initiated, but not completed, rulemaking proceedings to construe its authority under the waiver provision; and that, in the notice of proposed rulemaking (NPRM), the FCC had tentatively offered the conclusion that, to advance the interests of competition and diversity in the cable market codified in Section 533(b), and to avoid the constitutional questions raised by the cross-ownership bar, it would construe Section 533(b)(4) to permit LECs to offer video programming directly to common carrier subscribers over video dialtone systems[1] that "will compete with existing cable

[1] "Video dialtone" refers to the transmission, by telephone companies, of video services by means of a system made available to multiple programmers on a common carriage basis. See Pet. 8 n.7. Whereas telephone companies previously did not have the technology to deliver video signals over local telephone networks, video dialtone has become possible because "fiber-optic systems, digitization, and other technological advances have made it possible to transmit video signals over

operators, thus providing consumers with a choice of multi-channel video systems." Pet. 13-14; see Pet. App. 149a.

On May 16, 1995, as our petition was going to press, the FCC issued a Third Report and Order, adopting the construction of the waiver provision proposed in its NPRM. See Supp. Br. App., *infra*, 1a-21a. The FCC has concluded that, under 47 U.S.C. 533(b)(4), it has "the legal authority to grant waivers allowing telephone companies to provide video programming in their telephone service areas on video dialtone networks." *Id.* at 2a. The FCC therefore "will routinely grant a waiver of [the cross-ownership bar] where the telephone company agrees to abide by the regulations [that the FCC] will establish governing its provision of video programming." *Id.* at 19a.

In adopting its reading of the waiver authority, the FCC noted that two courts of appeals have concluded that the cross-ownership bar violates the First Amendment because it "burdens substantially more speech than is necessary" to achieve the government's significant interests in promoting competition and diversity in media outlets, Supp. Br. App., *infra*, 4a, and that several district courts have also enjoined enforcement of the bar, *id.* at 7a. The FCC also stressed that this Court has instructed that "a statute is to be construed where fairly possible so as to avoid substantial constitutional questions." *Id.* at 6a

integrated facilities rather than over separate networks and have greatly expanded the capacity of these facilities." Supp. Br. App., *infra*, 12a. Video dialtone thus offers the potential for an additional outlet for the transmission of video programming to customers in each area currently served by a cable operator.

(quoting *United States* v. *X-Citement Video, Inc.*, 115 S. Ct. 464, 467 (1994)). The FCC concluded that its proposed reading of its waiver authority would "cure [the] constitutional infirmities" perceived in the cross-ownership bar, Supp. Br. App., *infra*, 6a n.11, and make it "unnecessary for [the] courts to decide whether a *complete prohibition* on video programming by telephone companies in their exchange areas is constitutional," *id.* at 7a (emphasis added), because the LECs would henceforth be able to provide video programming directly to subscribers in their service areas.

The FCC addressed two statutory issues in construing Section 533(b)(4): whether there is "good cause" to waive the cross-ownership bar, and whether such a waiver is "justified by the particular circumstances * * * taking into account the policy of [the bar]." Supp. Br. App., *infra*, 9a. The FCC found at least two reasons to conclude that "good cause" exists to allow LECs to provide video programming over video dialtone systems. First, " '[g]ood cause' is a phrase that is commonly associated with changed circumstances," *id.* at 11a, and the growth in the cable industry from "a fledgling service to a more mature industry * * * [that will] not be extinguished before it is established" constitutes changed circumstances since Congress enacted the bar in 1984, *ibid.* Second, "significant advances in technology" such as video dialtone "have made it possible for a multitude of programmers to reach end user customers and have mitigated to a fair degree the competitive concerns that led the Commission and Congress to adopt the cross-ownership ban." *Id.* at 11a-12a.

The FCC also concluded that waiving the bar to allow LECs to provide video programming via video

dialtone would advance the policies of Section 533(b), namely, promoting competition and diversity in the market for video programming. The FCC emphasized that its video dialtone regulatory framework includes a common carriage element, such that a LEC offering video dialtone must make capacity available to other, unaffiliated video programmers. Thus, "[t]he common carrier aspect of video dialtone service promotes both competitive and free speech interests by making room for more than one speaker." Supp. Br. App., *infra*, 13a.

The FCC also made clear that LECs would be allowed to offer video programming in their service areas only if they agree to abide by regulations that will be established to prevent anti-competitive abuses such as cross-subsidization and discrimination against competitors. Supp. Br. App., *infra*, 19a. The FCC intends to set forth the specific terms and conditions under which LECs will be permitted to provide video programming in a subsequent order. See *id.* at 6a n.11, 13a-14a.

2. As we suggest in our petition (Pet. 16), the FCC's rulemaking substantially alters the constitutional question presented for review in this case. The court of appeals held Section 533(b) invalid principally because it precluded the LECs from providing video programming directly to their common carrier subscribers; the court believed that the restriction burdened substantially more speech than was necessary to promote the government's legitimate interest in preventing anti-competitive abuses by the LECs. See Pet. App. 47a-48a. When combined with the FCC's new reading of its waiver authority, however, Section 533(b) no longer operates as a complete bar on LEC provision of video programming in their service areas. Instead, the LECs will be free, in the future, to

offer video programming to their subscribers, if they adhere to regulatory safeguards to be promulgated by the FCC. The FCC has been able to adopt that less restrictive approach because of advances in technology, and it has concluded that waivers of the bar, as outlined in the Third Report and Order, will not undermine the objectives of Section 533(b).

The court of appeals has not had an opportunity to consider the constitutionality of the statute's operation in combination with the FCC's construction of its waiver authority. It may take a different view of the constitutionality of the statute (or at least shed additional light on that question), now that the LECs will have the opportunity to provide video programming directly to their subscribers. Given the significant alteration in the legal landscape effected by the FCC's Third Report and Order, we respectfully suggest that further consideration of this case by the court of appeals is appropriate before this Court undertakes to review the constitutionality of the statute.

* * * * *

The petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded for further consideration in light of the FCC's Third Report and Order.[2]

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

MAY 1995

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[2] The final footnote of our petition has, of course, been superseded by the FCC's issuance of the Third Report and Order.

APPENDIX

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 95-203

CC DOCKET No. 87-266

IN THE MATTER OF
TELEPHONE COMPANY-CABLE TELEVISION
Cross-Ownership Rule, Sections 63.54-63.58

THIRD REPORT AND ORDER

Adopted: May 16, 1995

Released: May 16, 1995

By the Commission:

I. INTRODUCTION

1. In this *Third Report and Order*, we adopt the tentative conclusion set forth in the *Fourth Further Notice of Proposed Rulemaking* ("*Fourth*

FNPRM")[1] in the above captioned docket regarding our legal authority to waive Section 613(b) of the Communications Act, 47 U.S.C. § 533(b). Section 613(b) generally prohibits telephone companies from providing "video programming directly to subscribers in the[ir] telephone service area." However, the statute expressly authorizes us to waive the restriction "where the provision of video programming directly to subscribers through a cable system demonstrably could not exist except through a cable system owned by" a telephone company "or upon other showing of good cause." For the reasons set forth below, we conclude that Section 613(b)(4) authorizes us to grant waivers to allow telephone companies to provide video programming directly to subscribers in their telephone service areas under certain conditions. In particular, in response to decisions of the Fourth and Ninth Circuits, we conclude that under Section 613(b)(4) we have the legal authority to grant waivers allowing telephone companies to provide video programming in their telephone service areas on video dialtone networks. We adopt that construction of the waiver provision because it is fully consistent with the language of the statute and Section 613(b)'s underlying policy, and because waiving the restriction in that manner obviates the constitutional infirmities identified by the courts of appeals. We do not decide any other issues raised in the *Fourth FNPRM* in this Order. In particular, we do not decide whether telephone companies may provide video programming over video dialtone networks rather than as traditional cable operators. In addition, if a telephone company is permitted to provide video programming on a video

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[1] *Telephone Company-Cable Television Cross-Ownership Rules, Sections 63-54-63.58*, FCC 95-20, Fourth Further Notice of Proposed Rulemaking (released Jan. 20, 1995) ("*Fourth FNPRM*").

dialtone system, we are not here deciding whether that telephone company should be regulated under Title II or Title VI of the Communications Act. Nor do we decide the conditions under which telephone companies may be granted waivers to provide traditional cable service in their telephone service areas. Those issues and others will be decided in a subsequent order.

II. BACKGROUND AND SUMMARY

2. Section 613(b), which is sometimes referred to as the "cable-telco cross-ownership rule," prohibits a telephone company from operating a cable system where it has a monopoly on local telephone service. More specifically, although Section 613(b) does *not* bar a telephone company from acting as a conduit to carry video programming selected and provided by an unaffiliated party, it *does* generally bar a telephone company from selecting (or "exerting editorial control over") and providing the video programming carried over its wires in its local service area. Two courts of appeals, the Fourth and Ninth Circuits, have recently held Section 613(b) unconstitutional.[2] At the heart of both decisions is the conclusion that the statute unnecessarily limits speech by telephone companies because it prohibits them from choosing the video programming to be provided in their local exchange telephone service areas *altogether*. In so holding, both courts referred to the Commission's 1992 recommendation to Congress in our video dialtone docket, a proposal that the Ninth Circuit described in *US West* as a "more speech-friendly

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[2] *See US West, Inc. v. United States*, 48 F.3d 1092 (9th Cir. 1995) (*US West*); *Chesapeake and Potomac Tel. Co. v. United States*, 42 F.3d 181 (4th Cir. 1994) (*C&P*).

plan" than the absolute ban contained in the statute.[3] Under the Commission's legislative recommendations, as described by the Fourth Circuit in *C&P*, "telephone companies' editorial control over video programming [would be limited] to a fixed percentage of the channels available; the telephone companies would be required to lease the balance of the channels on a common carrier basis to various video programmers."[4] In short, the courts of appeals have held that a complete ban on editorial control over video programming in a telephone company's service area " 'burden[s] substantially more speech than is necessary,' " especially since there appeared to be an " 'obvious less-burdensome alternative[]' "—allowing the telephone company to provide some video programming in their telephone service areas on a video dialtone system.[5]

3. We now conclude, as we previously proposed in the *Fourth FNPRM*, that we have the authority to grant waivers to telephone companies pursuant to Section 613(b)(4) allowing them to provide video programming directly to subscribers in their telephone service areas over video dialtone networks. Section 613(b)(4) provides that upon a showing of "good cause" the Commission may waive the cable-telco cross-ownership restriction where a waiver is "justified by the particular circumstances . . . , taking into account the policy" underlying the cross-

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[3] *US West*, 48 F.2d at 1105, citing *Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking*, 7 FCC Rcd 5781, 5850 (1992) (*Video Dialtone Order*).

[4] *C&P*, 42 F.3d at 202, citing *Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking*, 7 FCC Rcd 5781, 5850-5851 (1992).

[5] *Id.*, quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989), and *Chesapeake & Potomac Tel. Co. v. United States*, 830 F. Supp. 909, 930 (E.D. Va. 1993).

ownership restriction.[6] Our current video dialtone rules, which are based on fundamental principles of common carriage, are designed to enhance competition in the multichannel video distribution market by providing multiple video programmers access to end user subscribers over the telephone company's network.[7] Consistent with this common carrier model, our current video dialtone rules generally preclude any one programmer from serving as an "anchor programmer" and hence monopolizing the channels on the system. Waivers authorizing telephone companies to provide video programming in those circumstances will advance the policy underlying the cross-ownership restriction, which was enacted to promote competition in the multichannel video programming market.[8]

4. Construing the waiver provision to authorize telephone companies to provide video programming over video dialtone networks avoids the constitutional infirmity identified by the Fourth and Ninth Circuits

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[6] We have waived the cable-telco cross-ownership rules on a number of occasions. Typically, these waivers have been sought on a temporary basis for experimental purposes, or to allow telephone companies to come into compliance with our cross-ownership rules by, for example, divesting cable holdings acquired after mergers. *See, e.g., Time Warner Entertainment Co., L.P. and US West Communications, Inc.*, 8 FCC Rcd 7106 (1993).

[7] *See Video Dialtone Order*, 7 FCC Rcd 5781 (1992), *aff'd in part and modified in part on recon.*, 10 FCC Rcd 5781 (1994) *Telephone Company-Cable Cross-Ownership Rules, Section 63.54-63.58, Memorandum Opinion and Order and Reconsideration and Third Further Notice of Proposed Rulemaking* (*Video Dialtone Reconsideration Order*), *petition for review pending sub nom. Mankato Citizens Tel. Co. v. FCC*, No. 92-1404 (D.C. Cir. Sept. 9, 1992).

[8] *See NCTA v. FCC*, 914 F.2d 285, 287 (D.C. Cir. 1990) ("the policy [of Section 613(b)] is to promote competition").

by making available the " 'obvious less-burdensome alternative' " referenced by those courts.[9] Moreover, it is our duty to so construe the statute. The Supreme Court has recently reiterated in *United States v. X-Citement Video, Inc.* that "a statute is to be construed where fairly possible so as to avoid substantial constitutional questions."[10] Thus, as the agency charged with implementing the Communications Act, we should construe it in a manner that renders it constitutional, and the decisions invalidating Section 613(b)(4) plainly show that, absent a waiver allowing telephone companies to offer video programming over video dialtone networks, there is a serious question as to whether Section 613(b) unnecessarily burdens substantially more speech than is necessary to promote competition in the multi-channel video programming market.[11]

5. In light of the ongoing litigation concerning the constitutionality of Section 613(b), we have decided to adopt the construction of Section 613(b)(4) that we proposed in the *Fourth FNPRM* before answering the other questions presented in this rulemaking. The Supreme Court will soon have to decide whether to review the Fourth Circuit's

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[9] *See C&P*, 42 F.3d at 202; *US West*, 48 F.3d at 1104.

[10] *United States v. X-Citement Video*, 115 S. Ct. 464, 467 (1994).

[11] While the courts have identified video dialtone as a possible means by which telephone companies could provide programming in their service areas to remedy the constitutional infirmities of Section 613(b), and while we agree with the suggestion of these courts that waiving Section 613(b) as discussed above will cure these constitutional infirmities, we will address the terms and conditions under which telephone companies should be permitted to provide video programming directly to subscribers in their local service areas in a subsequent order addressing the other issues raised in the *Fourth FNPRM*.

decision in the *C&P* case. A rehearing petition is pending in the Ninth Circuit in the *US West* case.[12] In addition, a number of district courts have issued injunctions barring enforcement of Section 613(b), and some of those decisions have been appealed.[13] By implementing a "more speech-friendly plan" pursuant to the waiver authority granted in Section 613(b)(4), we make it unnecessary for those courts to decide whether a complete prohibition on video programming by telephone companies in their exchange areas is constitutional.

III. DISCUSSION

6. On account of the cable-telco cross-ownership ban, in our initial video dialtone orders we envisioned telephone companies providing a common carrier platform over which others would transmit programming.[14] In the ongoing trials of video dialtone service, some programmers are "packagers"—that is,

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[12] In February, the government suggested that the Ninth Circuit hold the rehearing petition in abeyance while the Commission considers the issue we decide today, and the Ninth Circuit has not yet acted on the rehearing petition. *See* Appellants' Petition for Rehearing and Suggestion for Rehearing *En Banc*, Ninth Cir. No. 94-35775 (filed Feb. 10, 1995).

[13] *See NYNEX Corp. v. United States*, No. 93-1523 (D. Me. December 8, 1994), appeal pending 1st Cir. No. 95-1183; *Ameritech Corp. v. United States*, 867 F. Supp 721 (N.D. Ill. 1994), appeal pending 7th Cir. No. 95-1223; *BellSouth Corp. v. United States*, Civ. A. No. 3-93-1024 (N.D. Ala. 1994), appeal pending 11th Cir. No. 94-7036; *United States Telephone Association v. United States*, No. 1:94CV1961 (D.D.C.), appeal pending D.C. Cir. No. 95-5117; *Southwestern Bell Corporation v. United States*, Civil Action No. 3:94-C-0193-D (N.D. Tex. March 27, 1995); and *Southern New England Telephone Co.*, No. 3:94-CV-80 (DJS) (D. Conn. April 28, 1995).

[14] *See Video Dialtone Order*, 7 FCC Rcd 5781 (1992); *Video Dialtone Reconsideration Order*, 10 FCC Rcd 244 (1994).

they provide packages of multiple channels, much like a cable operator—while other programmers provide individual channels. In light of the court decisions granting injunctions to telephone companies barring the enforcement of the cable-telco cross-ownership rule,[15] we have authorized two telephone companies conducting video dialtone trials to select and provide some of the video programming to be carried over their video dialtone systems subject to certain conditions adopted in those orders and any subsequent safeguards that the Commission determines will be necessary.[16] In the *Fourth FNPRM*, we asked for comment on the terms and conditions under which local telephone companies should be permitted to provide video programming directly to subscribers in their local service areas. For instance, we asked whether we should permit them to

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[15] *See Chesapeake & Potomac Tel. Co. v. United States*, 42 F.3d 181 (4th Cir. 1994), rehearing denied (Jan. 18, 1995); *US West, Inc. v. United States*, 855 F. Supp. 1184 (W.D. Wash. 1994), *aff'd*, *US West, Inc. v. United States*, 48 F.2d 1092 (9th Cir. 1995); *BellSouth Corp. v. United States*, 868 F. Supp. 1335 (N.D. Ala. 1994); *Ameritech Corp. v. United States*, 867 F. Supp. 721 (N.D. Ill. 1994); *NYNEX Corp. v. United States*, No. 93-1523 (D. Me. Dec. 8, 1994); *GATE South, Inc. v. United States*, No. 94-1588-A (E.D. Va. January 13, 1995); *Southwestern Bell Corporation v. United States*, Civil Action No. 3:94-C-0193-D (N.D. Tex. March 27, 1995); *United States Tel. Ass'n v. United States*, No. 1:94CV01961 (D.D.C. Feb. 14, 1995); and *Southern New England Telephone Co.*, No. 3:94-CV-80 (DJS) (D. Conn. April 28, 1995).

[16] *See Bell Atlantic Telephone Companies, Order and Authorization*, FCC 95-15, File No. W-P-C 6834 (released Jan. 20, 1995) ("*Bell Atlantic Market Trial and Authorization*"); *BellSouth Telecommunications Inc., Order and Authorization*, DA 95-181, File No. W-P-C-6977 (Com. Car. Bur. released February 8, 1995) ("*Bell South Market Trial Order and Authorization*").

do so over video dialtone systems.[17] A key issue in the *Fourth FNPRM* is whether such a telephone company is subject to regulation as a common carrier under Title II of the Communications Act, as a cable operator under Title VI of the Act, or under some combination of the statutory provisions governing those sorts of companies.[18] Additional issues involve the sorts of safeguards that are needed to ensure that the telephone company, acting in its capacity as the transporter of video signals, does not discriminate against independent programmers in favor of its affiliated programmer.[19] We do not resolve those issues or others posed by the *Fourth FNPRM* today. However, we construe Section 613(b)(4), the waiver provision, as authorizing us to permit telephone companies to act as programmers on video dialtone systems pursuant to certain conditions. The remaining issues raised in the *Fourth FNPRM* will be resolved in a further order in this proceeding.

7. Two statutory issues are presented in construing Section 613(b)(4): (1) whether "good cause" exists to waive the statutory restriction to permit a telephone company that wants to provide programming in its service area to do so over a video dialtone system, and (2) whether "the issuance of such waiver is justified by the particular circumstances demonstrated by the petitioner, taking into account the policy of this subsection," when a telephone company requests waiver of Section 613(b) to provide video programming over a video dialtone system.[20] The commenters have paid scant attention to these issues, but we believe that an explanation is warranted as to why there is good cause for granting

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[17] *See Fourth FNPRM* at para. 10.

[18] *Id.* at para. 9.

[19] *Id.* at paras. 20-41.

[20] 47 U.S.C. Section 533(b)(4).

a waiver under circumstances that will promote competition in the multi-channel video programming market.

8. As the D.C. Circuit recognized in its 1990 *NCTA v. FCC* decision, "the policy [of Section 613(b)] is to promote competition."[21] Congress enacted Section 613 "to prevent the development of local media monopolies, and to encourage a diversity of ownership of communications outlets."[22] The House Report on the 1984 Cable Act explained that Congress's intent in enacting Section 613(b) was "to codify current FCC rules concerning the provision of video programming over cable systems by common carriers,"[23] and the Commission adopted those rules in 1970 to "preserv[e], to the extent practicable, a competitive environment for the development and use of broadband cable facilities and service and thereby avoid undue and unnecessary concentration of control over communications media either by existing carriers or other entities."[24] That is, when the Commission adopted its cable-telco cross-ownership rules in 1970, it sought to prevent the telephone companies from using their monopoly position to preempt the market for cable service by excluding others from

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[21] *NCTA v. FCC*, 914 F.2d at 287.

[22] H.R. Rep. No. 934, 98th Cong., 2d Sess. 55 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4692.

[23] H.R. Rep. No. 934 at 56, *reprinted in* 1984 U.S.C.C.A.N. at 4693.

[24] *Applications of Telephone Companies for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems; Final Report and Order*, 21 FCC 2d 307, 325 (1970) ("*Cable-Telco Cross-Ownership Rules Order*"), *reconsidered in part*, 22 FCC 2d 746 (1970), *aff'd sub* [*nom.*] *General Tel. Co. of the Southwest v. United States*, 449 F.2d 846 (5th Cir. 1971).

entry.[25] The Commission explained that it sought to avoid extending, "without need or justification, the telephone company's monopoly position to broadband cable facilities and the new and different services such facilities are expected to be providing in the future."[26] Since 1970, however, the cable industry has grown from a fledgling service to a more mature industry that now serves a majority of households and "has replaced over-the-air broadcast television as the primary provider of video programming."[27] While Congress's interest in promoting diverse information sources and discouraging anti-competitive abuses remains highly relevant in today's video marketplace, its concern with ensuring that the cable industry not be extinguished before it is established is no longer relevant. "Good cause" is a phrase that is commonly associated with changed circumstances.[28] The relevant circumstances have changed greatly since the Commission adopted its cross-ownership rules in 1970 and Congress "modeled [Section 613(b)] after the FCC['s] rules"[29] in 1984.

9. We also conclude that significant advances in technology have changed the circumstances relevant

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[25] The Commission specifically sought to curtail the opportunities telephone companies would otherwise have to take advantage of their monopoly control over the conduits and telephone poles required for the transmission of video programs to cable subscribers. *Cable-Telco Cross Ownership Rules Order*, 21 FCC 2d at 324.

[26] *Id.* at 324.

[27] *Turner Broadcasting System, Inc. v. United States*, 114 S. Ct. 2445, 2454 (1994), citing Section 2(a)(17) of the 1992 Cable Act.

[28] *See, e.g., Illinois v. ICC*, 713 F.2d 305, 310 (7th Cir. 1983); *Greyhound Corp. v. ICC*, 668 F.2d 1354, 1362 (D.C. Cir. 1981).

[29] *GTE California, Inc. v. FCC*, 39 F.2d 940, 942 (9th Cir. 1994) (*GTE California*).

to determining whether telephone companies should be permitted to provide video programming directly to subscribers in their service areas.[30] When Congress enacted the cable-telco cross-ownership restriction, telephone companies did not have the technology available to them to deliver video signals over the networks they used to provide common carrier telephone service, much less the capability and capacity to provide access to a multitude of video programmers. However, as the D.C. Circuit has recently recognized, since the mid-1980s "technology was advancing rapidly and the once clear line between the provision of video and the provision of voice service was blurring."[31] That is, fiber-optic systems, digitization, and other technological advances have made it possible to transmit video signals over integrated facilities rather than over separate networks and have greatly expanded the capacity of these facilities.[32] These developments have made it possible for a multitude of programmers to reach end user customers and have mitigated to a fair degree the competitive concerns that led the Commission and Congress to adopt the cross-ownership ban. These technological developments also support the

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[30] Technological advances have long been an accepted basis upon which good cause has been found to justify waiving the cable-telco cross-ownership restriction. In its 1978 *Clarification Order*, the Commission clarified the criteria we would use in granting good cause waivers; the Commission stated that, in particular, we would consider recent technological developments as a justification for a good cause waiver. This standard was cited with approval by the court in *NCTA v. FCC* (1990). *Revision of the Processing Policies for Waivers of the Telephone Company-Cable Television "Cross Ownership Rules"* 69 FCC 2d 1097, 1110-111 (1978) ("*Clarification Order*"); *NCTA v FCC* (1990), 914 F.2d at 289.

[31] *NCTA v. FCC*, 33 F.3d 66, 69 (D.C. Cir. 1994).

[32] *See id.*

conclusion that "good cause" exists to authorize telephone companies to provide video programming within their service areas where that will promote competition in the multichannel video programming market.

10. We also conclude that the rules we will promulgate in the immediate future to authorize telephone companies to provide video programming in their service areas will constitute "particular circumstances . . . , taking into account the policy" of Section 613(b). While we have not yet adopted definitive rules governing the conditions under which telephone companies may be permitted to act as video programmers over their video dialtone systems, the outline of two of those requirements is clear. First, video dialtone necessarily includes a common carriage element, and we have previously concluded that a telephone company may not allocate all or substantially all of its capacity to a single "anchor programmer."[33] Accordingly, a telephone company providing video dialtone service is not allowed to occupy all of the channels provided by the system, but has a common carrier obligation to make capacity available to others.[34] The common carrier aspect of video dialtone service promotes both competitive and free speech interests by making room for more than one speaker. Second, our current video dialtone rules contain provisions intended to ensure that telephone companies providing video programming directly to subscribers do not discriminate in favor of their

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[33] *Video Dialtone Reconsideration Order*, 10 FCC Rcd at 260.

[34] In authorizing Bell Atlantic and BellSouth to provide programming to subscribers [as] part of their video dialtone trials, we required them to make 50% of their system's capacity available to unaffiliated programmers. *See Bell Atlantic Market Trial and Authorization* at paras. 31, 65(d); *BellSouth Market Trial and Authorization* at paras. 17, 52(a).

affiliated programmers and do not subsidize video programming operations with rates collected from their provision of monopoly telephone services.[35] These restrictions are intended to promote the underlying purpose of Section 613(b) by fostering fair competition in the multi-channel video programming market.[36]

11. Construing the waiver provision to authorize telephone companies to provide video programming pursuant to our video dialtone rules obviates the constitutional difficulties associated with Section 613(b). Specifically, the Fourth Circuit and Ninth Circuit have held that the cable-telco cross-ownership restriction "burden[s] substantially more speech than is necessary" to promote the government's interest in promoting a competitive multi-channel video programming market.[37] Waiving Section 613(b) to allow telephone companies to offer

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[35] The Commission has developed a number of safeguards that are designed to prevent cross-subsidization and discrimination when telephone companies provide "enhanced services." The safeguards against cross-subsidization include accounting and cost allocation rules that separate nonregulated service costs from the costs associated with providing basic regulated telephone service. The non-discrimination safeguards include a variety of rules designed to ensure that unaffiliated enhanced service providers have access to the network on the same basis as affilated enhanced service providers and are not otherwise unfairly disadvantaged. In the ongoing rulemaking proceeding in this docket, we will decide what safeguards are needed when telephone companies provide video programming over video dialtone systems.

[36] It is possible that we will decide in the ongoing rulemaking proceeding that telephone companies ought to be permitted to provide traditional cable service, rather than participate as programmers on video dialtone systems, under "particular circumstances" that will promote competition in the multichannel video programming market.

[37] *See C&P*, 42 F.3d at 202.

video programming in their service areas over video dialtone platforms, however, constitutes implementation of the "obvious less burdensome alternative" to the ban identified by the Fourth Circuit.[38] Or, to quote the Ninth Circuit, it implements the "more speech-friendly plan" that allows telephone companies "to compete in the video programming market" while "requiring that a portion of their transport volume be set aside for sale to unaffiliated third parties on a common carrier basis."[39] As a result of our construction of the waiver provision, telephone companies' free speech interests are not unduly burdened. Telephone companies have always been permitted to provide video programming directly to subscribers in all areas of the country outside of their service areas. In addition, they may produce video programming and provide it to unaffiliated broadcasters, cable operators, or other mass media outlets both within and outside of their service areas.[40] Pursuant to the reading of the waiver provision we adopt today, telephone companies also may seek a waiver of the statutory restriction in order to provide programming directly to subscribers over video dialtone facilities where they have a monopoly on local exchange telephone service. Thus, under our reading of the statute, telephone companies have abundant opportunities to speak.

12. The fact that waiver of the cable-telco cross-

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[38] We recognize that the Fourth Circuit reserved judgment on the constitutionality of our recommended model. *C&P*, 42 F.3d at 202 n.34. However, if that recommended approach does not render the statute constitutional then, contrary to the court's holding, it is not an "'obvious less-burdensome alternative,'" because it is no alternative at all. *Id.* at 202.

[39] *US West*, 48 F.3d at 1105.

[40] *Video Dialtone Reconsideration Order*, 10 FCC Rcd at 280-281.

ownership restriction obviates the constitutional difficulties identified by the courts of appeals supports our decision to construe our waiver authority to permit telephone companies to provide video programming over video dialtone systems. As the Supreme Court recently reiterated in *X-Citement Video*, "a statute is to be construed where fairly possible so as to avoid constitutional questions."[41] In other words, when given a choice between a permissible construction that would avoid constitutional problems and one that raises constitutional doubts, "[i]t is incumbent upon us to read the statute to eliminate those doubts so long as such a reading is not plainly contrary to the intent of Congress."[42] The Court also articulated this principle in *Jean v. Nelson*, when it found that "[p]rior to reaching any constitutional questions federal courts must consider nonconstitutional grounds for decision."[43]

13. While the majority of commenters did not address the waiver issue, there was support among the commenters for our reading of the statute.[44] Several commenters, however, opposed our reading of the waiver provision, including a telephone company, Southwestern Bell, which argues that our proposal constitutes an evisceration of the rule.[45] That is not so. As we have explained, the purpose of the rule is to promote competition. It generally would not promote competition to allow a telephone company to purchase an incumbent monopolist cable operator in the telephone company's service area. But it *does* promote competition to allow a telephone company to

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[41] *X-Citement Video*, 115 S.Ct at 467.

[42] *Id.* at 462.

[43] *Jean v. Nelson*, 472 U.S. 846, 854 (1985), *quoting Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99 (1981).

[44] *See* Comments of Southern New England Telephone.

[45] *See* Comments of Southwestern Bell at 43.

provide video dialtone service in its telephone service area in competition with an existing cable company. Accordingly, it would eviscerate the statute if we were to waive Section 613(b) to allow telephone companies to provide video programming directly to subscribers in their service areas over video dialtone facilities *and*, as a general matter, to purchase cable systems in their telephone service areas that do not face competition. But we are not authorizing such waivers in this order. Instead, we conclude only that Section 613(b)(4) authorizes us to waive the cable-telco cross-ownership rule to permit a telephone company to provide video programming over video dialtone systems in its telephone service area in competition with existing cable operators, a result that *furthers* the purpose of the rule.[46]

14. Both the United States Telephone Association and US West invoke *Secretary of State of Maryland v. Munson*[47] to argue that the statute cannot be saved by its waiver provision.[48] But this case is not at all similar to *Munson*. The *Munson* case involved a 25% limitation on the percentage of funds a charitable organization could keep, on the theory that a charity that used less than 75% of the funds that it raised on charitable purposes was engaged in fraud. The Court invalidated the state statute imposing the limitation upon concluding that "[t]he flaw in the statute is not simply that it includes within its sweep some impermissible applications, but that in all its applications it

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[46] We do not decide today whether we could grant a waiver authorizing a telephone company to build a traditional cable system in its telephone service area in competition with an existing cable system. Nor do we address the conditions under which a waiver might be warranted to allow a telephone company to purchase an in-region cable system.

[47] *Secretary of State of Maryland v. Munson*, 467 U.S. 947 (1984).

[48] USTA Comments at 6; US West Reply Comments at 6.

operates on the fundamentally mistaken premise that high solicitation costs are an accurate measure of fraud."[49] Moreover, the Court concluded that the statute stifled speech and discriminated against certain viewpoints, explaining that "the statute will restrict First Amendment activity that results in high costs but is itself a part of the charity's goal or that is simply attributable to the fact that the charity's cause proves to be unpopular."[50] The Court went on to hold that the statute was not saved by a provision allowing for waivers of the limitation. The Court stated that "[b]y placing discretion in the hands of an official to grant or deny a license, such a statute creates a threat of censorship that by its very existence chills free speech."[51] "Particularly where the percentage limitation is so poorly suited to accomplishing the State's goal," the Court added, "and where there are alternative means to serve the same purpose, there is little justification for straining to salvage the statute by invoking the possibility of official dispensation to engage in protected activity."[52] In this case, in contrast, permitting telephone companies to provide video programming over a video dialtone system plainly advances the goal of making programming from a variety of sources available to the public—a goal that furthers rather than hinders First Amendment interests. Unlike *Munson*, speech is not stifled and unpopular viewpoints are not disadvantaged. Moreover, no discretion remotely comparable to that in *Munson* would be lodged in any official to grant or deny particular waivers under our approach. Rather, as part of any decision under 47 U.S.C. § 214 authorizing

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[49] *Munson*, 467 U.S. at 966.

[50] *Id.* at 967.

[51] *Id.* at 964 n.12.

[52] *Id.*

a telephone company to construct facilities, we will routinely grant a waiver of Section 613(b) where the telephone company agrees to abide by the regulations we will establish governing its provision of video programming. Accordingly, there is no "threat of censorship that by its very existence chills free speech."[53]

15. In light of our duty to interpret Section 613(b) in a fashion that renders the statute constitutional, there is no merit at all to the suggestion by some commenters that the Commission's interpretation of Section 613(b)(4) is barred by res judicata, collateral estoppel,[54] or some unnamed principle that allegedly prevents the Commission from construing a statute that a court has held unconstitutional.[55] In *X-Citement Video*, the Supreme Court read the federal child pornography statute in a manner that the Court acknowledged was not its "most natural grammatical reading" in order to avoid a serious constitutional issue after a court of appeals had held the statute unconstitutional.[56] In particular, the Court held that the statute required the government to prove that the defendant in a child pornography case knew that the material on which the prosecution was based contained child pornography even though the statute did not appear to contain such a scienter requirement.[57] In this case, in contrast, the language of the waiver provision is flexible, speaking of "good cause"

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[53] *Id.*

[54] *See* Comments of Ameritech at 7.

[55] *See, e.g.*, Comments of Bell Atlantic at 29-30; Comments of NYNEX at 29; Comments of Southwestern Bell at 43; Reply Comments of US West at 6.

[56] *X-Citement Video*, 115 S.Ct at 467.

[57] In fact, the dissenters in that case said that the Court gave the statute a construction "that its language simply will not bear." *Id.* at 473.

and "particular circumstances . . . , taking into account the policy of this subsection." Unlike the Court in *X-Citement Video*, we do not have to strain to construe the waiver provision so that it renders the statute constitutional. Rather, as we have explained, we believe that such an interpretation is fully consistent with both the language of the waiver provision and the policy underlying Section 613(b), and therefore is the best interpretation of Section 613(b)(4). For those reasons, and in light of the fact that such an interpretation also avoids a serious constitutional issue, we now adopt our tentative conclusion that the waiver provision should be interpreted to authorize us to consider and approve requests by telephone companies to provide video programming over video dialtone systems, subject to the rules we have enacted and any further rules we will enact to govern video dialtone systems.

16. Finally, we also conclude that our reading of Section 613(b)(4) is not foreclosed by the D.C. Circuit's 1990 decision in *NCTA v. FCC*. That case did not involve video dialtone service and presented no constitutional issue. It instead involved a waiver of FCC cross-ownership rules authorizing a cable operator to provide cable service over a telephone compan[y's] wires even though the cable operator was affiliated with the telephone company in violation of the rules by virtue of their joint interest in the contractor that was to build the cable system. The court acknowledged that the project "presents a number of advantages that might justify a good cause waiver."[58] However, it held that the Commission had "failed . . . to explain why any of these advantages require [the contractor's] participation as [the telephone companies'] contractor."[59] In this case, in

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[58] *NCTA v. FCC*, 914 F.2d at 289.

[59] *Id.*

contrast, in light of the decisions holding Section 613(b) unconstitutional, it is necessary to waive Section 613(b) to allow affiliates of telephone companies to provide video programming in order to render the statute constitutional. The Ninth Circuit recognized that a waiver might be warranted in these circumstances in *GTE California, Inc. v. FCC*,[60] a case that (unlike *NCTA v. FCC*) involved a constitutional challenge to Section 613(b). The Ninth Circuit stated in that case, in response to the argument that Section 613(b) is unconstitutional, that "GTECA did not present the constitutional issue to the Commission at a point in this proceeding where it could have tried to obviate the constitutional question by granting discretionary relief, such as a permanent waiver."[61] As that statement recognizes, a waiver is warranted to implement what the Ninth Circuit in *US West* termed our "more speech-friendly plan"[62] and hence avoid a serious constitutional issue.

III. CONCLUSION

17. Accordingly, IT IS ORDERED that Section 613(b) (4) of the Communications Act is interpreted to authorize waivers permitting telephone companies to provide video programming directly to subscribers in their telephone service area pursuant to the rules we will adopt in this docket or related rulemaking proceedings.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[60] *GTE California, Inc. v. FCC*, 39 F.3d 940 (1994).

[61] *Id.* at 946.

[62] *US West*, 48 F.3d at 1105.